

## Forum shopping

The relative jurisdiction of district courts is one of the issues being explored with a view toward possible reorganisation of the court system in the Netherlands. In this connection, there is a need for better insight into 'forumshopping' by the parties in legal proceedings.

If a litigant has a choice between different judicial fora he can engage in forum shopping, i.e. try to bring the case before a particular court (or court division) because he feels this will result in a more favourable judgement at the lowest cost.

A phenomenon that is related to forum shopping is *judge shopping*. Judge shopping is an effort by a litigant to influence the court's assignment of the case. By trying to influence which judge will hear the case or by trying to avert court allocation of the case to a particular judge the litigant as a rule hopes to gain partisan advantage. Sometimes, however, litigants engage in judge shopping to ensure assignment of a case to a judge regarded as having the knowledge, skill and ability to deal with a particular kind of case, regardless of the judge's ultimate decision in the case.

Judge shopping can lead parties to forum shop, but forum shopping can lead to judge shopping as well.

In the Netherlands the legislator protects certain interests of the parties in a legal conflict by regulating jurisdiction of the courts. The jurisdiction of courts at the same level of the Dutch court system depends on geographical features of the case (place of residence of the litigants, location of the incident). The Netherlands is divided into 19 court districts. Each district court has jurisdiction over proceedings in its district.

Each court has several divisions. The criminal division has jurisdiction over serious offences heard by a full-bench division (three judges) if the prosecutor demands six months' imprisonment or more and serious offences heard by a judge sitting alone if the demand is under six months. The sub-district court (the former *kantongerecht*, currently a division of the district court) has jurisdiction over small civil cases (claims of less than € 5000) and less serious criminal cases, while the civil division is competent in the larger civil cases (claims of € 5000 or more). The administrative division has jurisdiction over administrative cases.

Normally a plaintiff can bring his case before only one judicial forum: the court in the place of residence of the defendant. However, under special circumstances a case can be tried in another court. In criminal cases, the prosecutor can choose between the court with jurisdiction in the district where the suspect resides or in the district where the crime was committed. In civil cases litigants can agree on a

court in a judicial district other than the judicial district in which the defendant resides.

Also, sometimes the plaintiff can choose between two different divisions of the same court. By asking the court to impose a sentence over or under six months' imprisonment, the prosecutor determines whether the case will be heard by a full-bench division or a judge sitting alone. In civil cases by keeping a claim under € 5000, the case can be decided by a sub-district court where the plaintiff does not need a lawyer.

In criminal cases only one party, the prosecutor, has a choice, while in most civil cases the parties have to agree if they choose another forum than the court in the judicial district of the residence of the defendant.

### **The literature survey**

The aim of the literature survey is to get a clearer view of the possible consequences of forum shopping in the Netherlands. Because there is no Dutch literature about forum shopping, the international research literature is surveyed, most of it in English.

The survey first looked at strategic considerations, i.e. differences between courts perceived by the litigants as influencing their choice of forum. Litigants involved in a legal dispute sometimes engage in forum shopping as a litigation strategy. Perceptions of litigants (or their lawyers) of differences between courts, for example, differences in the quality of justice or expected financial award, may affect their choice of forum even though their perceptions are not always accurate.

The literature review also examined arguments against and in defence of forum shopping considered relevant to the Dutch situation.

#### *Results of the survey*

##### *Considerations of forum shopping litigants*

In the United States (USA) several studies during the nineteen sixties and nineteen nineties looked at lawyer attitudes toward choice of forum. All these studies examined the choice between a state or federal civil court where such a choice was possible (for instance, diversity cases, i.e. cases involving citizens of more than one US state, and cases concerning federal legal questions). Lawyers were asked about their reasons for choosing one forum over another. The perceived differences between fora included: bias (for instance, bias against non-residents or corporations), quality of judges, lawyers' own familiarity with processes and procedures of the court, costs (geographical convenience, fastness and efficiency of disposition, currency of court calendar and litigation costs), and expected awards.

American studies indicate that the following strategic considerations may influence the litigant's choice of forum: perceived differences in the quality of judges, costs, procedures, possibilities for obstructing the defendant, and the expected result. 'One-shotters/have-nots' (litigants without experience in litigation and of limited means) generally attach more importance to the costs and the expected award than the 'repeat-players/haves' (litigants with experience

in litigation and ample resources) who are more interested in possible long-term consequences of the case.

Lawyers whose clients and professional contacts are generally concentrated in one area seem to attach more importance to familiarity with the court than to the quality of the judges. The opposite is true for lawyers who have a more extensive professional network. Whereas perceived differences in the currency of the calendar, fastness and efficiency of the court are considerations taken into account in choosing a forum, lawyers and litigants tend to choose the most efficient and fast court with the most current calendar. However, a few lawyers, especially those with a legal practice of their own, prefer the slowest working court in order to gain more freedom to plan their own activities.

#### *Arguments against and in defence of forum shopping*

A number of arguments against forum shopping found in the international research literature could apply in the Netherlands too, namely that forum shopping:

- favours one of the litigants (the plaintiff);
- makes the administration of justice more expensive if the court chosen is not the nearest or otherwise most suitable court for the case;

Proponents of forum shopping argue that:

- a defendant summoned by a court that is not the most obvious choice for the case can ask to have the case transferred to another court with jurisdiction;
- forum shopping can make the administration of justice more expensive, but it can also keep a lid on the costs since it can encourage competition between courts and in this way improve efficiency and legal protection; better legal protection can lead to fewer legal proceedings;
- forum shopping can stimulate the harmonisation of the administration of justice.

#### **Implications**

The information available is limited to the forum shopping considerations of litigants in civil proceedings in the USA. Although the *same* considerations probably influence litigants' choice of forum in the Netherlands as in the USA, a consideration might weigh more heavily in one country. This may be true for civil proceedings in which generally all parties in both countries can influence the choice of forum. Perhaps the considerations of litigants in civil proceedings are different from those of prosecutors who engage in forum shopping in criminal proceedings where prosecutors are the only party given a choice. However, this has yet to be researched.

The literature concerning the pros and cons of forum shopping does not clearly indicate whether forum shopping is a positive or negative phenomenon. Forum shopping could lead to more competition between the courts and in this way promote their efficiency, the quality of judgements and the transparency of operating procedures. In addition, forum shopping could stimulate the specialisation of courts and the harmonisation of the administration of justice. Forum shopping, however, also has a downside. It could favour the plaintiff, especially if he is a 'repeat-player/have'. If the plaintiff chooses a court located outside the court district in which the defendant resides, the defendant, especially

one who is busy or of limited means, might not attend the trial. The court would then sentence by default (in the absence of the defendant). Courts found attractive because of their reputation, specialisation, or for some other reason, risk becoming overburdened and unable to cope with the overcrowded docket. Finally, forum shopping could lead to judge shopping.

### **Suggestions**

Research on forum shopping in the Netherlands could provide more insight in the phenomenon: the frequency of forum shopping, the strategic considerations of litigants (and their lawyers) that influence their choice of forum and the consequences of forum shopping.